IN THE

Supreme Court of the United States

FOR THE FIFTH CIRCUIT

No. 71-1450

LOYD ERASTUS DYAL, JR.

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Undersigned counsel, on behalf of Petitioner, LOYD ERASTUS DYAL, JR., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case entered on February 29, 1972, rehearing denied, March 29, 1972.

OPINION BELOW

The Opinion of the Court of Appeals is not yet reported and a copy of the Opinion below is attached hereto as Exhibit "A". A copy of the letter from the Court of Appeals indicating that no Opinion on denial of the Petition for Rehearing is attached as Exhibit "B".

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254 (1). The judgment of the Court of Appeals was entered on February 29, 1972.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN ALLOWING GOVERNMENT COUNSEL TO CROSS-EXAMINE CHARACTER WITNESSES CONCERNING ARREST OF DEFENDANT SUBSEQUENT TO DATE OF OFFENSES UPON TRIAL.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The Appellant in this case was indicted on a Four Count Indictment filed in the United States District Court in and for the Middle District of Florida charging the Petitioner, LOYD ERASTUS DYAL, JR., with having possession, custody and control of a distillery apparatus without proper registration, Count II with car-

rying on the business of a distiller without having given bond, Count III with wilfully and knowingly making and fermenting 100 gallons of mash, Count IV with possession of distilled spirits, in alleged violations of Sections 5179(a), 5601(a)(1), 5173(a), 5601(a)(4), 5601(a)(7), 5205(a)(2), 5604(a)(1) of Title 26, United States Code. The Petitioner entered his plea of not guilty and after filing all appropriate motions the same were considered and the cause proceeded to trial on the 26th day of October, 1970, before the Honorable Joseph P. Lieb, United States District Judge.

After receiving the charges of the Court, the Jury returned a verdict of guilty as charged in the Indictment as to each of the Four Counts. Immediately thereafter, Petitioner duly filed his Notice of Appeal to the Fifth Circuit Court of Appeals. Despite protest by defense counsel, the District Court Trial Judge allowed Government counsel to proceed in cross-examination of character witnesses presented by the Petitioner contrary to accepted principle of law that says:

> "It is the reputation up to the time of the act in question only which is admissible, and evidence of one's reputation subsequent thereto is not admissible." 29 AmJur 2d, Evidence.

The Trial Court allowed cross-examination of Petitioner's character witnesses concerning an arrest of Petitioner *subsequent* in time to the charges for which he was being tried. As a matter of fact, and to make matters worse for your Petitioner, and extremely prejudicial to him, the subsequent charge and arrest in question which was the subject matter of the cross-examination arose because of the pending Indictment which was being tried; that is, that your Petitioner had allegedly purchased a firearm disclosing that he was under Indict-

ment concerning the distillery charges being tried. A case citing with approval the above principle of law from *AmJur.* 2d is *Gross v. United States,* 394 F.2d 216 (8th Cir. 1968, appeal after remand, 416 F.2d 1205, cert.den'd, 397 U.S. 1013, 25 L.Ed. 2d 427, 90 S.Ct. 1245, wherein the Eighth Circuit Court of Appeals stated:

> "Generally, in a criminal case, the defendant may introduce evidence of his good reputation relating to the time and place of the act or acts charged and before. See Am.Jur. 2d, Evidence, §348; Underhill, Criminal Evidence §198 (5th Ed.)
>
> "Inquiry as to the reputation of the person involved must relate in criminal cases to that existing at the time of the crime, and a reasonable anterior time through which such reputation continues, not too remote from the date of the crime.
>
> "Reputation subsequent to the time of the commission of the crime is incompetent." Conrad, Modern Trial Evidence, §200.

Gross v. United States, supra, makes clear what other cases have held: That the target of the impeachment of a reputation witness is the credibility of the witness, not the prior conduct of the Petitioner. And, certainly, the subsequent conduct of the Petitioner, insofar as known to the witness, is highly improper and prejudicial because to cross-examine into such conduct is *worse* than attempting impeachment on the basis of the charge being tried. The charge *on trial* and arrest relating thereto would have a bearing on the Petitioner's reputation in the community, so that impeachment of the character witness as to the charge on trial would be ridiculous if the law permits, as it does, a Petitioner to benefit by his *prior* good reputation. The reputation of a Petitioner at the time of the acts in question, as it

relates to likelihood *at the time* of criminal commission of the acts charged, is in issue, not his reputation a*fter* dissemination into the community of the fact of the arrest being tried. Even worse and further from the issue is cross-examination by the Government concerning a later arrest based upon the pending charge, as happened herein. In effect, all of the man's problems related to the indictment herein and he should have the benefit of his prior good reputation in the *first* case against him, though trial of the second charge would find his reputation tainted (or, more accurately, cross examination tactics could interject the taint) because of the first arrest.

See also, *Awkard v. United States,* 352 F.2d 641, (D.C. Cir. 1965), stating the law as follows:

> The reputation to be proved should be the Petitioner's good reputation in the community in which he lives at the time of the alleged crime or shortly preceding that time. Lomax v. United States, 37 App.D.C. 414, 418 (1911).

It should be noted from *Gross v. United States, supra,* that *cross* examination in this reputation situation is very closely scrutinized by the courts because of the damage that can be done to the point that the jury is to be given a cautionary instruction as to the limited purpose of such cross-examination, which instruction was not given below.

The Court of Appeals for the Eighth Circuit has passed upon the questions involved in this case in *Gross v. United States,* supra, and has ruled that such examination was prejudicial and not in keeping with the applicable law.

CONCLUSION

The Petition for Writ of Certiorari should be granted and this Court should thereafter reverse the judgment of the Court of Appeals.

LAW OFFICES OF HENRY GONZALEZ

By _____

HENRY GONZALEZ
620 Madison Street
Tampa, Florida

Attorney for Petitioner

CERTIFIATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above has been furnished to the United States Attorney, Tampa, Florida, by U.S. Mail, this 1st day of May, 1972.

HENRY GONZALEZ

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1450

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOYD EARSTUS DYAL, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(February 29, 1972)

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

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EXHIBIT "A"

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

March 29, 1972

TO ALL PARTIES LISTED BELOW

Re: No. 71-1450—United States of America vs.
Loyd Erastus Dyal, Jr.

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By s/s ALVIN M. WINCHESTER
Depty Clerk

cc: Messrs. Henry Gonzalez
Robert H. Mackenzie
Mr. Oscar Blasingame

EXHIBIT "B"

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1492

LOYD ERASTUS DYAL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on all four counts of an indictment which charged him with possession, custody and control of a distillery apparatus without proper registration, with carrying on the business of a distillery without having given bond, with making mash on premises other than on lawfully designated premises and with possession of distilled spirits, in violation

of 26 U.S.C. 5179(a), 5601(a)(1), (4) and (7), 5173(a), 5205(a)(2), and 5604(a)(1). He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed without opinion on February 29, 1972, and a petition for rehearing was denied on March 29, 1972 (Pet. App. A and B). The petition for a writ of certiorari was filed on May 15, 1972, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the petition raises no issues warranting review by this Court.

In brief, the evidence showed that in August 1969, petitioner had a large moonshine still built and brought to his premises in Tampa, Florida. At no time did he post the bond required by law for the operation of a distillery. On September 9, 1969, government agents executed a search warrant on his premises and seized ninety gallons of mash, the still and an unstamped jug filled with distilled spirits. In his defense, petitioner admitted fermenting mash and operating the still on the date of its seizure (Tr. 247-248), but claimed that he had been entrapped by a state officer.

As part of his defense, petitioner called four witnesses who each testified that petitioner's reputation for telling the truth was good (Tr. 297, 334, 336, 339). The sole contention here is that the trial court erred in allowing the government to cross-examine these character witnesses as to whether they had heard that petitioner had been arrested for furnishing false statements in the purchase of a firearm sub-

sequent to the date of the offenses for which petitioner was being tried (Tr. 331, 334, 336, 339). The court permitted the cross-examination after a lengthy discussion of this issue with counsel out of the presence of the jury (Tr. 297-331).[1] Thereafter three of the witnesses replied that they had read about the arrest in the newspaper.

The cross-examination of these character witnesses was proper since such "cross-examination may take in as much ground as the testimony it is designed to verify." *Michelson* v. *United States*, 335 U.S. 469, 484. Here, after petitioner sought to bolster his credibility at the time of trial by showing that his reputation for telling the truth was good, the government questioned his character witnesses with information that may have affected that reputation. See *United States* v. *Null*, 415 F.2d 1178, 1180 (C.A. 4), where the court noted: "With the defendant's credibility as a witness in issue, his reputation *at the time of trial* was crucial and, therefore, relevant." *Gross* v. *United States*, 394 F.2d 216 (C.A. 8), upon which petitioner relies, is not to the contrary. In that case, the witnesses who testified to the defendants' reputation in Helena, Montana, were cross-examined

[1] Although petitioner pointed out that the arrest involved was a recent charge (Tr. 324), he did not contend in the trial court that reputation evidence subsequent to the time of the commission of the earlier charge was incompetent.

about the defendants' reputations at a different place and at a different time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

[2] Moreover, unlike this case, the court in *Gross* made no effort to ascertain whether there was a basis in truth for the questions asked in cross-examination.

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